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In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 703

AMERICAN LIBERTY PIPE LINE CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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To the Honorable The Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the construction of Section 26(c)(2) of the Internal Revenue Act of 1936. 49 Stat. 1648. Petitioner was chartered as a Delaware corporation December 27, 1935. (R. 39, 67, 72.) Prior to petitioner's incorporation its promoters, on November 15, 1935 (Ex. 1, R. 93, 96) and again on November 21, 1935 (Ex. 2, R. 97-103) offered to sell notes in the sum of $1,250,000.00 to be secured by a first mortgage on the properties of the proposed cor-

poration, to the Republic National Bank & Trust Company of Dallas, Texas. On December 13, 1935 the Republic National Bank & Trust Company agreed to place such note issue, upon compliance with certain conditions precedent set out in the Bank's letter of commitment of that date. (R. 104-110, Ex. 5.) In both the offer to sell made by the promoters and the agreement to purchase made by the Bank, it was stipulated that three-fourths of the net earnings of petitioner should be applied to the payment of principal and interest on such note issue, and one-fourth thereof be set aside in a special fund from which legal organization, financing and other expenses approved by the trustee might be paid, with the provision that any unexpended funds in this account at the end of one year should be applied to the discharge of such indebtedness.

Its charter having been obtained the petitioner proceeded to enter into contracts with Fredell Construction Company to construct 105 miles of pipe line (R. 116-117); Oil Well Supply Company to purchase 36 miles of pipe (Ex. 10, R. 118-119); and National Supply Company to purchase 74 miles of pipe. Each of these contracts was entered into during the month of January, 1936. In each instance also the petitioner, or the promoters acting on behalf of the petitioner assigned a portion of the proceeds of the loan to be obtained from the Republic National Bank & Trust Company either in payment of its obligation under such contracts or as security for such payment.

Republic National Bank & Trust Company was notified by petitioner by letter dated June 11, 1936, that all the terms of the commitment letter requisite to closing the loan

had been performed (Ex. 18, R. 142-144), and on June 18, 1936, the deed of trust was executed by petitioner and the loan was closed, and thereafter the petitioner paid to various creditors the portions of the proceeds of the loan which it had previously assigned to them. (R. 76.)

Subsequent to the date of such deed of trust the petitioner operated under the terms thereof and regularly paid to the trustee the required portion of its earnings until May 1, 1938, when there remained due the sum of $319,-091.12. On that date petitioner obtained a new loan secured by a lien upon all of its properties, from the Bank of The Manhattan Company in the amount of $1,500,-000.00, out of which the balance of the original loan was taken up. The deed of trust securing this note subrogated the Bank of The Manhattan Company to all of the rights, remedies and securities granted to the original note holders. (R. 56.)

Petitioner filed this suit in The Tax Court of the United States alleging that respondent erroneously refused to allow petitioner any credit under the provisions of Section 26(c) of the Revenue Act of 1936 in computing surtaxes on undistributed profits for each of the fiscal years 1937 and 1938. (R. 4, 5.)

The Tax Court held that no contract had been executed prior to May 1, 1936; that even if such contract had been executed prior to that date it had not been executed by petitioner and finally that if a contract were in existence and had been executed by petitioner prior to May 1, 1936,

the claim must be disallowed because no contract executed prior to that time created any "debt." (R. 47, 48.)

On appeal by petitioner the United States Circuit Court of Appeals, by judgment entered July 14, 1944, sustained the holding of The Tax Court and refused petitioner any relief. (R. 176-182.)

The judgment of the Circuit Court of Appeals denies to petitioner any right to relief under the provisions of Section 26(c) from the surtaxes on undistributed profits imposed by the Revenue Act of 1936. This is the only issue presented by this petition.

THIS COURT HAS JURISDICTION

It is contended that this Court has jurisdiction to review the judgment here in question because this is a case "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." [Supreme Court Rule 38, Par. 5(b).]

This Court is expressly given jurisdiction to review by certiorari the decision of the Circuit Court of Appeals "either before or after a judgment or decree by such lower court." (43 Stat. 938, 28 U. S. C. 347.) *Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

Judgment was entered in this case by the United States Circuit Court of Appeals on July 14, 1944. (R. 176.)

THE QUESTION PRESENTED

The only question presented in this case is whether the petitioner executed a contract in writing prior to May 1, 1936, requiring that petitioner's earnings be paid in discharge of a debt incurred prior to that date within the meaning of Section 26(c)(2) of the Revenue Act of 1936.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The decision of said Circuit Court of Appeals as to there being no contract and no debt in existence prior to May 1, 1936, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit, on the same matter, in the case of *Commissioner v. Haskelite Mfg. Corp.*, 128 Fed. (2d) 902; with the decision of the Circuit Court of Appeals for the Sixth Circuit, on the same matter, in the case of *Glenn v. Chess & Wymond*, 132 Fed. (2d) 631; and with the decision of the Circuit Court of Appeals for the Fifth Circuit (its own decision) on the same matter in the case of *Scofield v. Valley Pipe Line Co.*, 138 Fed. (2d) 835.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 10,947, *American Liberty Pipe Line Co., Petitioner v. Commissioner of Internal Revenue,*

Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court, and for such other relief as to this Court may seem proper.

AMERICAN LIBERTY PIPE LINE CO.,

By GERALD C. MANN,
Counsel for Petitioner.

FOWLER ROBERTS,
Of Counsel.

Dallas, Texas,
November 22, 1944.